Theresa Rice

From: Ken Sethney [ken@sethney.com]
Sent: Wednesday, June 20, 2012 2:03 PM
To: Council
Cc: PCD
Subject: Bainbridge Shorelines Testimony 6/20/2012
Attachments: Bainbridge Shoreline Homeowners testimony 6-20-2012.pdf

Dear Council Members,

I hope to have 6 minutes to present the first two pages of the attached document during tonight's study session on behalf of Bainbridge Shoreline Homeowners. The attachments are referenced in my testimony. They are intended to help you with your deliberations regarding nonconforming vs. conforming designation of existing, lawfully built structures and vegetation buffers.

Ken Sethney, Director
Bainbridge Shoreline Homeowners
206.605.1667

June 20, 2012

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0 - bi.shoreline@gmail.com

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ive and I serve on the board of
d served on the Existing Development
ved staff's draft of the SMP update.

d many times who we are and who

Vashington State and the IRS.

homeowners and all are volunteers

contributed to our organization since it

ered an online poll identifying
ncern about the SMP update.

petition to the Council to adopt a
v while **protecting the environment**

horeline families.

d has consistently voted against the
if the SMP doesn't go our way.
o Six BIG Problems.

When we first presented our petition to the Council and the Planning Commission last August, it had 690 signatures. Since then, we have collected another 342 -- about 50 or so from island residents who don't live on the shoreline. But they too believe that the island's land use regulations must be reasonable and fair.

- Shoreline homeowners ask that our city's SMP declare existing, lawfully built homes to be "conforming." We do not accept the notion of "nonconforming with benefits" as presented in the current draft.

- We ask that any new regulations, including vegetation buffers, be applied to future development only, as per the state's SMP guidelines.

- And we ask that vegetation buffers be site specific to account for the vast differences between storm facing beaches and sheltered coves -- high bank, mid-bank and low-bank properties -- and those properties which are constantly battered by ship wakes from ferries, freighters, cruise ships, and war ships.

In recent months, Planning Commissioners and others have suggested that our group doesn't understand the meaning of the word "nonconforming." They suggest that shoreline homeowners should accept the designation as a part of common legal parlance. After all -- they tell us -- it's only a word.

Our board members have been studying these issues since 2008. We're a group of reasonably well educated people. But none of us are lawyers or land use consultants. So we decided to ask for a bit of professional help -- with this question and others -- to make sure we weren't advising the Council on the basis of misunderstanding, speculation, or irrational fear.

We retained four professional firms to help us:

- RW Thorpe and Associates of Mercer Island. The firm has been helping cities and homeowner groups develop reasonable land use regulations for many years.

- Kim McCormick, a land use attorney and six-year member of our city's Planning Commission.

- Rob Cousins, a geologist and land use attorney, and

- Dennis Reynolds, a land use attorney and former Assistant Attorney General.

After reviewing their comments, our board has decided to share their confidential memos and reports with the Council and the community at large. I remind you, we are not interested in litigation. We are interested in reasonable solutions that protect the environment and our property rights.

As it turns out, we clearly understood the implications of nonconforming status in land use regulations after all.

Betty Renkor of the Dept. of Ecology gave a presentation about "nonconforming basics" several years ago. She said, "... *in reality, nonconforming structures may exist for a long time, but the long term goal is elimination.*"

The stigma of this long term goal is simply unacceptable.

In a brief article recently submitted to the Council by a Bainbridge shoreline homeowner and respected professor of economics, Dr. Lewis Mandell suggests that the Council should vote to make waterfront homes nonconforming only if scientifically-verified environmental benefits are so enormous as to offset an inevitable loss in value.

He also pointed out that any loss in property tax revenue to the City would be automatically transferred to inland homeowners. The City wouldn't lose -- but all of its tax paying residents would.

The good news is that the legislature has provided cities and counties with a way out. A way to declare existing, lawfully built structures to be conforming and avoid the stigma and long-term financial consequences of nonconforming status.

Bainbridge Shoreline Homeowners asks you to join Kitsap County by integrating the language of SB 5451 into our SMP.

Thanks for your consideration.

Attachments:

- Kim McCormick letter re: nonconforming
- Dennis Reynolds letter re: nonconforming
- Rob Cousins letter re: vegetation buffers
- Ken Sethney article re: property rights

Law Office of Kim McCormick, PLLC

June 16, 2012

Mr. John Bomben, Chair
Board of Directors
Bainbridge Shoreline Homeowners
P.O. Box 10034
Bainbridge Island, WA 98110

Re: Proposed Nonconforming Section in Bainbridge Island Shoreline Master Program (SMP) Update

Dear Mr. Bomben:

I have reviewed Section 4.2.1 Nonconforming Development of the proposed Update to the Bainbridge Island Shoreline Master Program (SMP Update) and have the following comments and proposed changes to the language currently being recommended by the Bainbridge Island Planning Commission for adoption by the City Council.

I. Section 4.2.1 Nonconforming Development Should Be Deleted In Its Entirety and Replaced With A Section Addressing Existing Development.

Section 4.2.1 as currently drafted applies to all residential shoreline uses and/or structures that were lawfully established or constructed prior to November 26, 1996, when the initial Shoreline Master Program (SMP) was adopted, and which do not conform to present regulations or standards in the SMP. While the intent of the section, as set forth under Section 4.2.1.2 Goal, is "to recognize legally established primary residential structures, and to allow them to be maintained, repaired, remodeled, replaced and in some cases expanded in conformance with these rules," the actual proposed rules have the opposite effect. They instead propose to make all such uses and structures nonconforming, and then add an extensive and confusing series of regulations for those structures and uses.

Because the SMP Update states throughout Chapter 4 that its provisions apply to all new uses and structures that are within the SMP designated areas, most if not all of the provisions in Section 4.2.1 are unnecessary, duplicative and confusing. For example, Section 4.1.2 Environmental Impacts includes extensive regulations regarding all shoreline use and development. All Existing Development that is changed or expanded must comply with those provisions, so labeling it nonconforming does not promote the primary goal of the SMP – no net loss of ecological function in the shoreline areas – or any other goals of the SMP and instead creates substantial confusion between different sections in the SMP Update. Labeling Existing Development as nonconforming is also inconsistent with established land use law that prohibits retroactive application of regulations to existing uses.

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There is nothing in the Shoreline Management Act (SMA) or its implementing regulations that requires the SMP Update to label existing residential development as nonconforming. WAC 173-26-191(2)(a)(iii)(A) reiterates that a master program's "effect is generally on future development and changes in land use" . . . and further states that "In some circumstances existing uses and properties may become nonconforming with regard to the regulations and master programs should include provisions to address those situations in a manner consistent with achievement of the policy of the act and consistent with constitutional and other legal limitations."

By addressing Existing Development as just that, rather than labeling it as nonconforming, the SMP Update will achieve the goals of the SMA and avoid violating the property rights of shoreline homeowners across the island. Both the SMA regulations on nonconforming use and development standards, set forth at WAC 173-27-080, and recently enacted Senate Bill 5451, recognize that labeling Existing Development as nonconforming and then enacting a separate set of regulations to address only those properties and uses, is inconsistent with both established land use laws and regulations and the intent of the SMA.

II. Senate Bill 5451

Senate Bill 5451, Section 1, states that updated SMPs "must include provisions to ensure that expansion, redevelopment, and replacement of existing structures will result in no net loss of the ecological function of the shoreline. Classifying existing structures as legally confirming will not create a risk of degrading shoreline natural resources."

The legislation further provides (RCW 90.58.620 (1)) that updated SMPs may include provisions authorizing:

(a) Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and

(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if it is consistent with the master program, including requirements for no net loss of shoreline ecological functions.

The legislation underscores that an SMP may limit redevelopment, expansion, or replacement of over-water structures located in hazardous areas, such as floodplains and geologically hazardous areas, and that "appurtenant structures" does not include bulkheads and other shoreline modifications or over-water structures," thereby allowing SMP provisions that specifically apply to those areas. RCW 90.58.620(2), (3).

In accordance with SB 5451, the SMP Update can simply add a section addressing Existing Development, broken down by Existing Uses and Existing Structures, that labels all such uses as conforming and then requires all repair, maintenance, expansion or modifications to be consistent with existing laws and regulations.

III. Proposed Kitsap County SMP Update Language

The Kitsap County update to its SMP proposes language that should be considered for adoption by Bainbridge Island. It is concise, easy to understand and apply, and is consistent with SMP policies and goals. A copy is attached for consideration by the City Council. It states in pertinent part:

5.1.1 Existing Uses

A. Lawfully established uses occurring as of the effective date of this Program shall be considered conforming, with the exception of existing over-water residences and non-water-oriented commercial or industrial uses, which shall be considered nonconforming.

B. All lawfully established uses, both conforming and nonconforming, may continue, and may be repaired, maintained, expanded or modified consistent with the Act and this Program.

5.1.2 Existing Structures

A. Lawfully constructed structures

1. Lawfully constructed structures, including those approved through a variance, built before the effective date of this Program, shall be considered conforming, with the exception of existing over-water residences, which shall be considered nonconforming.

2. All lawfully constructed structures may continue and may be repaired or maintained in accordance with the Act and this Program.

Adopting this approach to Existing Development is effective, consistent with the SMA and protects the property rights and expectations of Bainbridge Island shoreline residents. Existing structures and uses may continue, with modifications allowed as consistent with the SMP Update.

Sincerely,

Kimberly M. McCormick
Law Office of Kim McCormick, PLLC

Attachment (Kitsap County Draft SMP Section 5.1)

Chapter 5 General Regulations

5.1 Existing Development

5.1.1 Existing Uses

A. Lawfully established uses occurring as of the effective date of this Program shall be considered conforming, with the exception of existing over-water residences and non-water-oriented commercial or industrial uses, which shall be considered nonconforming.

B. All lawfully established uses, both conforming and nonconforming may continue, and may be repaired, maintained, expanded or modified consistent with the Act and this Program.

C. Any change in use shall conform to the standards of this Program or require a Conditional Use Permit (CUP). A CUP may only be granted if no reasonable alternative use meeting the standards is practical and the proposed use will be at least as consistent with the policies and provisions of this Program and the Act and as compatible with the uses in the area as the preexisting use. Conditions may be imposed that are necessary to assure compliance with the above findings and with the requirements of this Program and the Act, to assure that the use will not become a nuisance or a hazard, and to assure that the use will not result in a net loss of the ecological function of the shoreline.

D. If a use is discontinued for twelve consecutive months or for twelve months during any two-year period, any subsequent use, if allowed, shall be water-oriented and comply with the Act and this Program.

5.1.2 Existing Structures

A. Lawfully constructed structures

1. Lawfully constructed structures, including those approved through a variance, built before the effective date of this Program shall be considered conforming, with the exception of existing over-water residences, which shall be considered nonconforming.
2. All lawfully constructed structures may continue and may be repaired or maintained in accordance with the Act and this Program.
3. Lawfully constructed conforming structures may be expanded or redeveloped in accordance with the mitigation standards of Appendix B (Mitigation Options to Achieve No Net Loss for New or Re-Development Activities) and all other applicable regulations. Such structures shall also be considered conforming.
4. In the event that a legally existing structure is damaged or destroyed by fire, explosion or other casualty, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged or destroyed, provided the application is made for the necessary permits within six months of the date the damage or destruction occurred, and the restoration is completed within two years of permit issuance or the conclusion of any appeal on the permit.
5. Any legally existing structure that is moved any distance must be brought in to conformance with the Act and this Program.

B. Existing Appurtenances to Single Family Residences. Those legally existing appurtenances that are common to existing single family residences shall be considered conforming. Such appurtenances may include garages and sheds, but shall not include bulkheads, overwater structures or other shoreline modifications.

C. Vegetation Conservation Standards of this Program shall not apply retroactively in a way which requires lawfully existing uses and developments, including residential landscaping and gardens to be removed, except as required as mitigation for new and expanded development.

5.1.3. Existing Lots

A. An undeveloped lot, tract, parcel, site, or division of land located landward of the OHWM that was created or established in accordance with local and state subdivision requirements prior to the effective date of this Program or the Act, but which does not conform to the present lot size standards, may be developed if permitted by other land use regulations so long as such development conforms to all other requirements of this Program or the Act.

B. This section does not modify the rules regarding the development of plats under RCW 58.17.170 as now or hereafter amended.

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June 19, 2012

By Email (bi.shoreline@gmail.com) Only
John Bomben, Chair
Bainbridge Shoreline Homeowners
P.O. Box 10034
Bainbridge Island, WA 98110

Re: Existing Development and Uses and New Buffers

Dear Bainbridge Shoreline Homeowners Board:

You have requested my views about ways to improve the Draft Shoreline Master Program ("SMP") forwarded by the Planning Commission to the City Council.

My first suggestion is that the Bainbridge Shoreline Homeowners ("BSH") urge the City Council to declare all existing structures and uses conforming under the proposed new Shoreline Master Program.[1] A client group I represent in Kitsap County has successfully added language to the County's Draft SMP that does that, keying in on existing use and existing development.

The BSH should also urge the City Council to: (1) allow incremental redevelopment (including expansion) and repair of existing structures via insertion of a strong policy statement that such development is not considered a threat to the aquatic environment if done in compliance with existing law, including required project mitigation; and (2) recognize the benefits of regional restoration projects when considering "no net loss," especially in the context of minor repair, expansion or alteration of existing structures.

The State Guidelines mandate recognition of public restoration projects. *See* WAC 173-26-186 (8)(c). The Puget Sound Partnership ("PSP"), its "Action Plan," and the Puget Sound Near Shore Ecosystem Restoration Project envision significant restoration for Puget Sound over the next 25 years. The resulting net gain from these projects should more than off-set any impacts from incremental redevelopment, repair or alteration of existing waterfront homes or other shoreline structures.

The City Council also needs to be better advised on the doctrine of nonconforming use and the actual effect of the language proposed by the Planning Commission. The Planning Commission wrongly assumes that a "legally nonconforming" status adequately protects private property if new buffers are imposed to the built environment; it does not. In fact, the actual language makes existing homes and other structures nonconforming despite an expressed intent not to do so. *See* Goal 4.2.1.2, then read the specific language requiring the repair or alteration of an existing structure to comply with the Draft's nonconforming structure regulations.

[1] The State Guidelines specify that new regulations should apply only to undeveloped land: "While the master program is a comprehensive use regulation applicable to all land and water areas within the jurisdiction described in the act, its effect is generally on future development and changes in land use." WAC 173-26-192(2)(a)(iii)(A).

The language in the Draft SMP as to nonconforming uses and structures is very convoluted, confusing and inconsistent. Again, I urge that the Board review Kitsap County's approach, then suggest that same approach to the City Council. The City Council needs to do everything possible to encourage citizen buy-in as to the new regulations. In my opinion, confusing citizens is not the way to go.

What prompts citizen distrust is being advised on the one hand that existing uses are not being regulated, then on the other reading the SMP which states: "Residential structures that do not conform to this program should, over time, as the owner proposes changes to the structure conform as completely as possible to this program …." (Draft, § 4.2.1.2).

Imposition of new large buffers or vegetation setbacks is the main regulatory tool that creates nonconforming uses and structures in the first place. The actual consequence is to make existing development nonconforming and over time force illegal restoration.[2]

Thus, the Guidelines correctly wall off existing development from the reach of such devices to avoid a "nonconforming" status. After all, "no net loss" is prospective. Retroactively declaring existing development nonconforming has no gain for the aquatic environment and does nothing to achieve "no net loss."

In terms of a vegetation conservation setback, the State Guidelines specifically recognize that provisions for vegetation conservation **cannot** be applied to existing development: "Like other master program provisions, vegetation conservation standards **do not apply retroactively** to existing uses and structures." WAC 173-26-221(5)(A) (emphasis supplied).

The Draft SMP ostensibly does not apply vegetation buffers retroactively to existing uses and structures. *See* Section 4.1.3.1. However, if alterations are proposed, the buffer restrictions apply! Thus, once again, the specific requirements in the regulations contradict the stated goal.

Application of buffers to redevelopment is nonsensical, as alterations to existing homes are common and any impacts associated with minor expansion or alterations pose no real threat to the environment. All the City has to do is require proportionate mitigation on a case-by-case basis through compliance with existing law.

In 2011, the Legislature enacted Substitute Senate Bill 5451 ("SSB 5451") (Chapter 323, Laws of 2011). That law addressed public concerns: " … expressed by residential property owners during Shoreline Master Program Updates regarding the legal status of existing shoreline structures that may not meet current standards for new development." Chapter 323, § 1. The Legislature stated that it intended to clarify "the legal status" of the structures that will apply after shoreline regulations are updated. The solution was to give power to local governments to classify existing homes and appurtenances as **legally conforming**:

> (1) New or amended master programs approved by the department on or after September 1, 2011, may include provisions authorizing:
>
> (a) Residential structures and appurtenant structures that were legally established and are used for a conforming use, but that do not meet standards for the following to be considered a conforming structure: Setbacks, buffers, or yards; area; bulk; height; or density; and ....

Washington Laws, 2011, Ch. 323, p.283.

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[2] The SMA does not mandate forced restoration. *See Swinomish Tribal Community v. WWGMHB*, 161 Wn.2d 415 (2007).

I do not understand why the Planning Commission would take away flexibility allowed by law or ignore public concerns expressed by citizens versus the state. I am unaware that the Commission has special insights beyond those of the State Legislature.

Certainly, it is not correct that a nonconforming label must be imposed, or that the difference between conforming or nonconforming is "only a semantic change" as claimed by Staff in its June 11, 2012 memo to the City Council, at page 4. Nor does alteration, expansion or repair of existing structures disqualify them as "conforming." To the contrary, the City Council has full discretion to apply SSB 5451, plus take into account local circumstances. Most of Bainbridge Island's shoreline is highly built out with single-family homes and approximately 60% of the shoreline is armored. Shielding off existing development from new regulations is more a recognition of existing circumstances than anything else.

One reason the Legislature decided to allow local governments to declare that existing development remain conforming is to avoid potential undue fiscal impact. Under the SMA, RCW 90.58.290, the County Assessor is required to take into account the affect on fair market value caused by regulations imposed under the SMA. A nonconforming status definitely could decrease the value of a property. It is respectfully submitted that you urge the City Council to consider this possibility because an unintended consequence could be allocation of a disproportionate tax burden to upland owners.

Staff in its April 27, 2012 memo to the Council, at p.3, identifies a "concern about the misinformation that many of the shoreline homeowners have regarding nonconforming development in particular." With due respect, "nonconforming" is not just a word, it is a legal concept, a status. The courts allow nonconforming uses and structures to be phased out, subject only to possible constitutional protections to recap investments via amortization: "The policy of zoning legislation is to phase out a nonconforming use." *Anderson v. Island County,* 81 Wn.2d 312, 321, 501 P.2d 594 (1972) (citing *State ex rel. Smilanich v. McCollum,* 62 Wash.2d 602, 384 P.2d 358 (1963)). This is because "[n]onconforming uses are disfavored under the law." *Open Door Baptist Church v. Clark County,* 140 Wn.2d 143, 150, 995 P.2d 33 (2000).

Thus, local governments are motivated to allow nonconforming uses to persist in order to avoid constitutional challenges to zoning ordinances. However, while "[a]s a general proposition, due process prevents the abrupt termination of what one had been doing lawfully[,] [t]he protection does not generally extend beyond this purpose." *Meridian Minerals Co. v. King County,* 61 Wash.App. 195, 212, 810 P.2d 31 (1991). In other words, at most, "abrupt termination" is protected, nothing more.

I am addressing basic and extremely important concepts, not mere "words." A practicable definition of "nonconforming" is "illegal but tolerated for now." The nonconforming label is an invitation over time to force citizens to give up use of their property in favor of "restoration" of the shorelines.

While the Draft SMP makes broad statements that legally constructed nonconforming structures can be redeveloped or expanded in some circumstances, the plan imposes a standard of "no adverse impacts." This is a vague, highly discretionary standard at odds with the law. There will always be some adverse impacts (albeit virtually unmeasurable) associated with any alteration or redevelopment. Note that pursuant to SSB 5451, redevelopment, expansion, change or replacing a residential structure is allowed: "... if it is consistent with the master program including requirements for no net loss of shoreline ecological functions." Washington Laws, 2011, Ch. 323, § 2(1)(b).

The Draft SMP allows reconstruction of destroyed lawfully constructed residential structures, but there are restrictions that the redevelopment or reconstruction must be completed within one year of the commencement of reconstruction and reconstruction must be commenced within two years of the date of the damage to the structure or its removal. Unless an accessory structure is "essential," if destroyed, it must be brought into compliance with the new program. For shoreline modifications, there are significant restrictions on repair or modification, including new regulations limiting "replacement and repair

modification activities … to the minimum footprint necessary" to protect an allowed primary structure or existing shoreline use.

These restrictions are a significant regulation of existing uses and development, contrary to platitudes that existing development is "grandfathered" and a nonconforming label versus a conforming status is just a matter of semantics.

The BSH Board advises it has heard complaints from some that it is not "fair" to follow the 2011 Legislative directive and continue to label existing development as "conforming" under the new Shoreline Master Program, since uplands that do not meet current restrictions under the Zoning Code are deemed "nonconforming." You say that BSH has no problem with the City amending its Zoning Code to make the shoreline regulations in the Zoning Code consistent. That is well and good, but consistency between zoning enactments and the Draft SMP is not legally required as the shorelines are considered under a different regulatory system than the Zoning Code.

Thank you for your kind attention to these comments. Other suggestions will follow by separate correspondence as the City Council takes up its review of the Draft SMP.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis D. Reynolds

DDR/cr

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June 20, 2012

VIA ELECTRONIC MAIL
Bainbridge Shoreline Homeowners
P.O. Box 10034
Bainbridge Island, WA 98110

Attention:John Bomben and Ken Sethney

RE: **Vegetation Management Buffers, Proposed Bainbridge Island SMP Update**

Dear Mr. Bomben and Mr. Sethney:

At your request I have reviewed the proposed City of Bainbridge Island's ("COBI") Draft Shoreline Master Program Update ("the draft") with respect to vegetation and setback buffer requirements. The purpose of my review was to analyze the City's proposed rule making on this particular issue from technical and legal perspectives to help your organization provide meaningful input to City Council on how best to implement proposed changes to the shoreline code and to help them best achieve the policy and intent of the shoreline code.

The Issue:

The Vegetation Management section 4.1.3 of the draft is a blend of overlay buffers and set- back requirements underpinned by a series of staff-discretionary options based on "site conditions". Site conditions have been grouped into several categories such as high and low bank and also within the much broader upland shoreline designations of Natural, Island Conservancy, Shoreline Residential Conservancy, Shoreline Residential, and Urban. The buffer distances and their subsequent impact on coastal ecosystems vary as shown on Table 4-3. From my review, the only site specific data that was used came from the Bainbridge Island Nearshore Assessment prepared by Batelle in 2003 and the Summary of Science Addendum prepared by the City's consultant, Herrera, Inc. in 2011. These documents were used by Staff to apply the proposed buffer distances over each of the above mentioned shoreline use designation as a whole.

Broad application of buffer requirements over large, homogenous geographic areas can be the most efficient way to regulate activity in those areas. However, the shoreline environment on Bainbridge Island is by no means homogenous. My personal experience is that geologic and ecological conditions can vary literally from property to property. These variations in groundwater and surface water flow regimes, slope stability, and types of vegetation directly affect the shoreline environment in very specific ways.

Keeping this in mind, The City's broad application of buffer and setbacks may be the easiest way for them to regulate large areas, but it is the least efficient and the least effective with respect to achieving the mandated intent of the SMP Update of achieving no net loss of ecological function.

Water Quality Concerns:

The Herrera memo correctly identifies Inorganic Nitrogen and Phosphorous as two compounds that degrade water quality and from a vegetation perspective, forests remove more inorganic nitrogen and phosphorous than grass. However, there is no mention of point source control of these compounds and other compounds that are contained in concentrated storm water runoff. The Department of Ecology cites septic systems, wastewater treatment plant effluent, and storm water runoff as the largest contributors to Puget Sound of these compounds. South Puget Sound Dissolved Oxygen Study, Prepared by the Department of Ecology (2008).

The United States Geological Survey states that the large river systems in Puget Sound basin are the primary transport mechanisms for these compounds, the main sources being animal manure, agricultural fertilizers, and the smallest contribution, atmospheric deposition. Nutrient Transport in the Major Rivers and Streams of the Puget Sound Basin, Washington, USGS Fact Sheet FS-009-98, March 1998 by E.L. Inkpen and S.S. Embrey).

The vegetative buffers and setbacks proposed for Bainbridge Island are among other things ostensibly intended to intercept pollutants flowing toward Puget Sound across largely residential properties. Based on the information above, the proposed buffers will have little mitigating affect on controlling contaminants entering Puget Sound. On-site septic (OSS) disposal (regulated by the Department of Health) are underground and have little to no affect on upland surface water quality and roof runoff, which does not require treatment and is frequently tight-lined toward the shoreline. Storm water runoff concentrated along upland roadway ditches adjacent to waterfront properties does not sheet flow overland onto private property. Most, if not all concentrated storm water flow is channeled and routed to existing natural drainage features or directly discharges to Puget Sound.

The draft identifies roadways (and by association roadside storm water channels) as physical features that functionally isolate the upland portions of the island from the shoreline environment irrespective of jurisdictional boundaries such as the 200-foot, SMA boundary. For this reason the vast majority of the roadways on Bainbridge Island will not be regulated under the proposed vegetation management plan. Concentrated storm water will continue to deliver degrading contaminants to Puget Sound.

Generalized buffers that affect large portions of waterfront properties simply will not address the water quality issues they are intended to regulate. In a very real sense, roadways functionally isolate waterfront property by affectively routing untreated storm water runoff directly into Puget Sound.

The Solution:

Convincing City council and staff that the application of buffer requirements on a smaller more accurate scale will achieve the best outcome for the no net loss goal and the protection of shoreline functions and values. Unfortunately, the City (and the department of Ecology to a certain degree) lacks the resources to create property specific regulations. Fortunately, a more specific means to create and regulate shoreline buffers is available. Vast amounts of data exist through Geographic Information Systems, satellite imagery, technical reports (including consultant reports commissioned by the City), and expertise of technical professionals such as biologists, habitat specialists, geologists, and arborists that can be applied to shoreline conservation and protection.

Licensed biologists, geologists, arborists, and engineers are the link between regulatory theory and academic research and the application of such ideas in practice. An effective solution is to utilize the expertise of these licensed professionals to analyze and assign buffer and setback distances based on specific site conditions.

Licensed professionals will be able to build on the analysis and research that the City's consultants have completed. Once a site specific analysis is completed, planning staff will act in a review capacity and applying more technically accurate site specific data to an existing framework defined in the code. In some instances the buffers may become larger and in some instances they may be reduced. This approach will maximize the shoreline ecological functions and achieve the no net loss goal.

Application:

The framework to apply this method already exists with the COBI code. Under the Critical Areas section of the existing code, geologically hazardous areas and wetlands are regulated through the application of site-specific studies and resultant buffers. Specific areas of expertise are identified with specific professional skills required to address critical areas (Critical Areas Code 16.20.090 Application Requirements). The code also outlines specific requirements of geotechnical and biological reports that must be addressed so planning staff can perform consistent, meaningful reviews. Examples of geotechnical report requirements are found in BIMC 16.20.150.

Wetlands are regulated similarly to geologically hazard areas. A qualified wetlands biologist must address existing on site wetland conditions, and apply existing regulatory code requirements, including mitigation, which are defined very specifically (BIMC 16.20.160). The ecological function and value of a wetland is based on its category as defined by the expert. A Wetland's category and buffer size can only be determined by experts in the field.

The city recognizes that these are highly specialized areas of practice that should be left up to experts in the field. Using the same application to vegetation and land use, site shoreline property usage affected by vegetation and set-back buffers can be tailored to maximize no net loss.

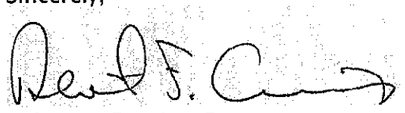
Site specific studies and site specific buffer identification will provide the property owner and the City with empirical data regarding habitat and water quality impacts of the site including the affects of neighboring properties and adjacent roadway runoff. Site specific, empirical data is a more powerful and more effective tool than a theoretical approach such as predetermined buffer zones.

The Law:

A staple of environmental law both at the state and federal level is that environmental regulations must be reasonably related to the activity that is to be regulated. Comprehensive vegetative buffer application that does not actually address the bulk of the water quality issues to be regulated do not reasonably relate to the City's stated goal of no net loss and would be vulnerable to a facial and substantive legal challenge. This is cogent to the subject at hand because site specific analysis with a code based framework is a more efficient and more effective means of achieving no net loss. The consultant work done by the city to date has high value as baseline documents and code provisions to guide the expert review of vegetation and setback buffers already. City staff would not be re-inventing the wheel or discarding valuable work done to date.

Thank you for the opportunity to research and provide my input on the buffer and setback issue. I know the goal of your organization is to build consensus through involvement with the SMP update process. Hopefully this information will aid in that goal. If you have any additional questions please call me at 206-459-7264.

Sincerely,



Robert F. Cousins, Esq.

What does the SMP have to do with property rights?

by Ken Sethney, Shoreline Homeowner

Arbitrary land use regulation has federal and state constitution civil rights and property rights implications. The Washington State Attorney General stated the following in an advisory memorandum to state and local agencies...

> *The public problem must be proven. In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions.*
>
> *First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner?*
>
> *Failing to consider and address each of these questions may lead to a substantive due process violation.*
>
> From the Washington State Attorney General's "Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," December 2006.

The questions our Planning Commissioners and City Council must ask are simple.

1. What is the public problem that must be solved with increased native vegetation buffers?
   - by making it difficult or impossible build or repair a bulkhead?
   - by banning docks and floats that conform to design specifications prepared by the Army Corps of Engineers, or
   - by dramatically increasing conservancy designations for lawfully developed family homes?
2. Are the proposed regulations reasonably necessary to solve the public problem?
3. Is the regulation unduly oppressive on the landowner?

For example, if bulkheads are only allowed when a home or appurtenant structure is threatened, the landowner may be required to watch a great deal of his property to be washed into Puget Sound, ostensibly for a public good. This seems unduly oppressive since the Washington Dept. of Fish & Wildlife currently recommends an alternative process — placing sand and gravel on the beach in front of the bulkhead.

If Bainbridge Island adopts land use regulations as part of its Shoreline Master Program that are unduly oppressive, unnecessary to solve a public problem, or implemented to solve unproven problems, expensive legal battles will follow. If the attorney general's office is correct, property owners will prevail, but we will all pay the price.

Again quoting the Washington State Attorney General...

> *There may be times where the government does not intend to acquire property through condemnation, but the government action nonetheless has a significant impact on the value of property.*
>
> *In some cases, the government may argue that its action has not taken or damaged private property, while the property owner argues that a taking has effectively occurred despite the fact that a formal condemnation process has not been instituted. This dispute may lead to an "inverse condemnation" claim, and the filing of a lawsuit against the government, in which the court will determine whether the government's actions have damaged or taken property.*
>
> *If a court determines that the government's actions have effectively taken private property for some public purpose, it will award the payment of just compensation, together with the costs and attorneys fees associated with litigating that inverse condemnation claim.*
>
> *Inverse condemnation cases generally fall into two categories: those involving physical occupation or damage to property; and those involving the impacts of regulation on property.*

Like every other quotation from a longer document or conversation, this was taken "out of context". To review the context, you may download the original document from the attorney general's website. It is an advisory memorandum to help state agencies avoid unconstitutional taking of private property. We encourage every shoreline homeowner and everyone involved in the SMP update process to read it. It will help our city avoid expensive legal conflicts in the future.